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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF
UNITED STATES

October Term, 1988

RONALD J. PERHOLTZ,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A
WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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- and -

QUESTION PRESENTED

Whether in the wake of the decision in McNally v. United States, 107 S. Ct. 2875 (1987), petitioner's conduct for which he was prosecuted was encompassed by 18 U.S.C. § 1341?

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OPINION BELOW

The United States Court of Appeals for the District of Columbia Circuit affirmed petitioner's conviction and

sentence in an opinion issued March 8, 1988, United States v. Ronald J. Perholtz, No. 88-3032 (D.C. Cir. March 8, 1988)[1]

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 8, 1988. Accordingly, this petition for a writ of certiorari is timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes are involved in this petition:

1. Section 1341 of Title 18 of the United States Code provides:

   Fraud and swindles

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[1] The other parties to the proceeding where Franklin W. Jackson and Gregory W. Fletcher.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at

the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. Section 1961(5) of Title 18 of the United States Code provides:

Definitions

As used in this chapter-

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

3. Section 1962(c) of Title 18 of the United States Code provides:

(c) It shall be unlawful for any person employed by or associated with any

enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the coundcut of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

This case arises out of the criminal prosecution of Ronald J. Perholtz and three others, of whom one was acquitted, for various actions which were characterized as mail fraud and brought under the umbrella of racketeering. Because the case was indicted and tried prior to this Court's decision in McNally v. United States, 107 S. Ct. 2875 (1987), both the monetary loss and pure fiduciary loss issues were presented to the jury.

Ronald J. Perholtz was convicted for a single substantative offense under the

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (c), for 13 counts of mail fraud under the Mail Fraud Statute, 18 U.S.C. § 1341, and for the forfeiture declared as to certain assets pursuant to 18 U.S.C. § 1963. The predicate acts for the racketeering conviction arose from two different schemes set forth in Counts 3 through 5 of the indictment and Counts 6 through 15 of the indictment.

Each of the schemes was charged, tried, argued and instructed on the principal theory that the citizens of this country have an intangible right to good government and that that right was violated by the conduct of petitioner Perholtz and others as they engaged in the two schemes set forth in Counts 3 through 15 of the indictment. The principal theory did not focus upon the deprivation of benefits that had monetary

aspects whether in a sum that had been liquidated or not. Carpenter v. United States, 108 S. Ct. 316, 321 (1987).

As the government conceded prior to this Court's decision in McNally, Counts 3 through 5 of the indictment set forth mail fraud allegations which "charged, Perholtz and Jackson were engaged in a mail fraud scheme, starting in 1977, to defraud the United States Postal Service ('USPS') of an honest procurement process by means of bribery and fraud and violation of 18 U.S.C. §§ 1341 & 2." (Government's opening brief in the United States Court of Appeals for the District of Columbia Circuit at 1, emphasis supplied.)

It similarly conceded that the mail fraud counts set forth in Counts 6 through 15 of the indictment "charged Perholtz, Jackson, Fletcher and Root with engaging in a mail fraud scheme to

defraud the Small Business Administration ('SBA') of an honest procurement process on another multi-million dollar contract by means of a receipt of kickbacks, fraud, and breaches of fiduciary and contractual duties, in violation of 18 U.S.C. §§ 1341 & 2. (Id. at 2, emphasis supplied.)

Subsequent to the briefing and argument of the case before the United States Court of Appeals, but prior to decision, this Court decided McNally.

Thereafter, petitioner sought leave to file supplemental briefs in light of the opinion in McNally.

Such briefs were filed and on March 8, 1988, the Court of Appeals determined that the dictates of McNally had not been breached.

REASON FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the District of Columbia Circuit[2], conflicts with this Court's decisions in McNally and in Carpenter v. United States. It also conflicts directly with several post McNally decisions of other courts of appeals. Furthermore, the lower courts have reached inconsistent results in deciding the applicability of McNally. Review by this Court is warranted to resolve this split among the circuits and to provide guidance to the lower courts in an area which has proven especially susceptible to inconsistent, divergent, and unreasonable results.

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[2] The Court of Appeals issued an opinion on appellants' motions for release pending appeal in United States v. Perholtz, 836 F.2d 556, 558-60 (D.C. Cir. 1988) which in part relates to its view of the McNally issue raised by this petition.

This Court's decision in McNally has been characterized as "block busting", United States v. Piccolo, 835 F.2d 517, 521 (3d Cir. 1987) (Aldisert, J., dissenting); a "total surprise", United States v. Slay, 673 F. Supp 336, 343 (E.D. Mo. 1987); and "wholly unexpected". United States v. Doherty, 675 F. Supp. 726, 728 (D. Mass. 1987).

The reactions of the Courts of Appeals to McNally have varied. Those which have reversed based upon polluted jury charges include: United States v. Gordon, 836 F.2d 1312 (11th Cir. 1988); United States v. Covino, 837 F.2d 65 (2d Cir. 1988); United States v. Murphy, 836 F.2d 248 (6th Cir. 1988); United States v. Gimbel, 830 F.2d 621 (7th Cir. 1987); and United States v. Herron, 825 F.2d 50 (5th Cir. 1987). Those which have affirmed convictions despite McNally. include: United States v. Piccolo, 835

F.2d 517 (3d Cir. 1987); United States v. Richerson, 833 F.2d 1147 (5th Cir. 1987); United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987); United States v. Wellman, 830 F.2d 1453 (7th Cir. 1987); United States v. Fagan, 821 F.2d 1002 (5th Cir. 1987), cert. denied, 56 U.S.L. W. 3459 (1988).

These cases illustrate the frequency and variety of challenges to the use of the mail fraud statute and the struggle in which the courts have engaged to realign the results of criminal cases to the "blockbuster" decision in McNally.

In the instant case, the trial court did not have the benefit of McNally and the Court of Appeals misconstrued it. The result is that this case and others have created confusion in an area which is repeatedly being litigated. In the context of this case, the Court has the further opportunity to signal clearly the

result dictated by McNally and to end the confusion and disparate results of lower court application of McNally.

In the trial of this case, the jury was principally offered evidence that petitioner Perholtz and others worked to deprive the government of the good faith efforts of its employees and agents. The Government never attempted to prove that a financial loss had resulted to it as a result of the conduct charged and proven at the trial. As a result, the jury in this case was offered evidence, heard argument and was instructed as to the loss of intangible rights without monetary loss by the Government. The jury also was instructed as to a monetary deprivation. Unquestionably, the trial court's instructions presented two theories to the jury.

Under McNally all that must be shown by petitioner Perholtz is that the

prosecution's principal theory of the case was that his participation in the charged self dealing procurement scheme defrauded the citizens and the Government of the United States of certain "intangible rights," such as the right to have the Government's affairs conducted honestly. In that event, the conviction simply cannot withstand scrutiny.[3]

Because this case was submitted to the jury on two theories, one of them

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[3] Petitioner Perholtz seeks permission of this Court to adopt the Questions for Review, Reasons for Allowing the Writ and Appendix of petitioner Franklin W. Jackson. Mr. Jackson was tried as a co-defendant of Mr. Perholtz, his appeal was heard as a consolidated case with Mr. Perholtz and, we submit, the issues before this Court as it considers this petition are identical to those presented on behalf of Petitioner Jackson. To avoid the filing of duplicative arguments and documents and for further reasons, petitioner Perholtz, respectfully requests that this Court allow him to adopt the appendix and positions put forth on behalf of petitoner Franklin W. Jackson. Counsel for Mr. Jackson have advised us that they have no objection to this request.

including the impermissible intangible or fiduciary rights theory, the writ should be granted. The Government must show that both theories presented to the jury are legally sufficient. "[A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds and one of those grounds is insufficient because the verdict may have rested exclusively on the insufficient ground." Zant v. Stephens, 462 U.S. 862, 881 (1983); See Yates v. United States, 354 U.S. 298, 311-12 (1957); Stromberg v. California, 283 U.S. 359, 367-68 (1931). When one of the Government's legal theories suffers from a legal flaw and fails to state an offense, the verdict simply cannot stand.

In light of McNally the verdict in this case is ambiguous because the jury could have rejected the monetary loss

theory and convicted only on the intangible or fiduciary rights theory. The presence of a monetary issue in the record does not warrant a result different than that urged here. The entire thrust of the government case was good government. Nothing in the jury charge on mail fraud required a finding of monetary loss. See, McNally, 107 S. Ct. at 2882; see also Runnels, 833 F.2d at 1194-95 (Guy, J., dissenting) (arguing that affirming on a legal theory not raised at trial is erroneous). Faced with an ambiguous verdict of the type at issue here, the appropriate course is to reverse each of the mail fraud convictions.

This case and those arising in other Circuit Courts of Appeals illustrate the frequency with which the federal courts are faced with questions concerning the proper construction of the mail fraud

statute in light of McNally. They also indicate the need for this Court to eliminate any ambiguity arising from McNally as to the applicability of 18 U.S.C. 1341 to conduct which is presented to a jury on both tangible and intangible rights theories. There is the potential for the expenditure of significant government resources in such cases and the causation of irrevocable harm to individuals without such clarification. Since this case presents an issue that is frequently litigated, and the Courts of Appeals are in conflict, review is warranted here to decide the unresolved issues springing from mail fraud prosecutions.

In the event that this Court determines that the mail fraud convictions under only one of the schemes Counts 3 through 5 or Counts 6 through 15, merit reversal, the racketeering

conviction of petitioner Perholtz should be reversed because of the failure of the Government to establish the required pattern of racketeering activity.[4] A single fraudulent scheme has been held to be insufficient to establish the predicate acts necessary for a racketeering conviction. See e.g. Lipin Enterprises v. Lee, 803 F. 2nd 322 (7th Cir. 1986) (12 predicate acts deemed insufficient to create a pattern since all alleged acts pertained to a single transaction with a single victim). See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n. 14 (1985); United States v. Joseph, 781 F.2d 549 554 (6th Cir. 1986) (if conviction for even one predicate offense underlying a substantive

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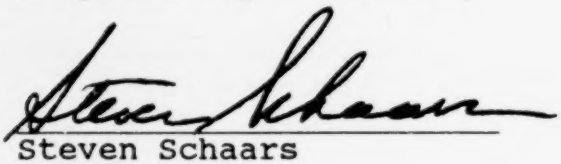
[4] Clearly a holding that all mail fraud counts are tainted will ultimately require reversal of the racketeering conviction because of the absence of sufficient predicate acts.

racketeering count is vacated, the substantive racketeering court must be vacated).

CONCLUSION

For all of foregoing reasons, and those submitted on behalf of Petitioner Franklin W. Jackson, Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE

I, Steven Schaars, a member of the Bar of this Court, hereby certify that on this 9th day of May, 1988, three copies of the Petition for A Writ Of Certiorari to the Supreme Court of the United States in the above-captioned case were mailed, first-class postage prepaid to each of the following:

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I further certify that all parties required to be served have been served.

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Dated: May 9, 1988